

**Objection to Construction Permit Application for Water and
Wastewater System Improvements
Permit Approval No. 20218
Town of Whitestown
Whitestown, Boone County, Indiana
2013 OEA 1, (12-W-J-4574)**

OFFICIAL SHORT CITATION NAME: When referring to 2013 OEA 1 cite this case as
Town of Whitestown, 2013 OEA 1.

TOPICS:

sanitary sewer construction
septic
High Density Polyethylene (HDPE) piping
directional drilling
grinder pumps
technical standard alternatives
alternate separation distance
existing private drinking water wells
newspaper publication notice
failing septic systems
false information
need for system
NPDES (National Pollution Discharge Elimination System)
expert witness
327 IAC 3-6-9
327 IAC 3-6-32
327 IAC 5
410 IAC 6-8.2-56

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

Petitioners: Dale W. Arnett, Esq.
Respondent/Permittee: Daniel P. McInerny, Esq., J. Christopher Janak, Esq.;
Bose McKinney & Evans, LLP
IDEM: Valerie Tachtiris, Esq.

ORDER ISSUED:

January 18, 2013

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
OBJECTION TO THE CONSTRUCTION PERMIT)
APPLICATION for WATER and WASTEWATER SYSTEM)
IMPROVEMENTS, PERMIT APPROVAL NO. 20218)
TOWN OF WHITESTOWN,)
WHITESTOWN, BOONE COUNTY, INDIANA)
) CAUSE NO. 12-W-J-4574
_____)
David D. and Ieva S. Johnson, Eva G. Sanders, and)
Joseph K. and Michelle Yeary,)
Petitioners,)
Town of Whitestown,)
Permittee/Respondent,)
Indiana Department of Environmental Management,)
Respondent)

FINDINGS OF FACT, CONCLUSIONS OF LAW and FINAL ORDER

This matter came before the Court for final hearing on September 13, 2012. At issue is whether the Indiana Department of Environmental Management’s (“IDEM”) decision to approve sanitary sewer system construction for the Town of Whitestown. The Chief Environmental Law Judge (“ELJ”), having considered the testimony, evidence, and pleadings of the parties, now finds that judgment may be made upon the record. The Chief ELJ, by substantial evidence, and being duly advised, now makes the following findings of fact and conclusions of law and enters the following Final Order:

FINDINGS OF FACT

1. Permittee/Respondent Town of Whitestown (“Whitestown”) applied to construct a sanitary sewer system in the Royalton and Cozy Lane area near Whitestown, Boone County, Indiana. *See Petitioners’ Ex. 9.* On January 18, 2012, the Indiana Department of Environmental Management (“IDEM”) received Whitestown’s January 6, 2012 application. The application, prepared by Whitestown’s consultant, GRW Engineers, Inc., included plans and specifications. *See Respondent’s Exs. A, B, C.*¹

¹Exhibits A, B and C were submitted on a computer disc designated as Exhibit H.

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2. Whitestown's Application sought approval for a sanitary sewer system. The Application did not contain requests for approval of a permit subject to regulation under the National Pollution Discharge Elimination System ("NPDES").
3. Whitestown's sanitary sewer system is intended to provide sanitary sewer service to 16 single-family homes and three commercial lots currently served by septic systems, with an expected total average of 5,890 GPD. *Ex. G.*
4. Whitestown's April 2, 2012 revisions, *Ex. E*, to IDEM's February 14, 2012 Deficiency Notice, *Ex. D* further refined the project design.² Design specifications stated in Whitestown's low pressure sanitary sewer system include 280 feet of 1.5-inch diameter high-density polyethylene ("HDPE") piping, 2,760 feet of 2-inch diameter HDPE piping, and 760 feet of 3-inch diameter HDPE piping, to be installed using directional drilling. *Exs. A, B, C.* Whitestown's Application included 20 grinder pump stations with service connection piping stub and curb stop assemblies, flushing connection, isolation valves and air release valves. *Id.*
5. During the application process, GRW Engineers requested two requests for technical standard alternatives, per 327 IAC 3-6-32, relating to the use of HDPE piping, directional drilling, grinder pumps, small diameter force mains, and small diameter gravity pipe.
6. GRW also requested an alternative separation distance between sewer piping and existing private drinking water wells, from the 50-foot standard separated in 327 IAC 3-6-9, to no less than 10 feet.
7. Some of the application material made brief references that some or all septic systems were failing or likely to fail.
8. On April 30, 2012, IDEM approved Whitestown's revised application through the issuance of a permit. *Ex. G ("Permit")*. The approved Permit contained approval of the two technical standard alternatives. All of the Petitioners were copied on IDEM's April 30, 2012 permit issuance. *Id., p. 2.*
9. The separation distance variance (to no less than 10 feet between system piping and existing drinking water wells) was not referenced in the Permit. IDEM based its use of the 10-foot standard without inclusion in the permit on its interpretation of 410 IAC 6-8.2-56, as allowing the type of pipe to be used by Whitestown to be subject to ten feet of separation instead of 50 feet. *Ex. I.*³

² Exhibits A, B, C and E are collectively referred to in this Final Order as Whitestown's "Application".

³ July 3, 2012 letter to Petitioner David Johnson from IDEM Senior Environmental Manager, Facility Construction and Engineering Support Section, Office of Water Quality Don Worley.

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10. Petitions⁴ for administrative review and stays of effectiveness of the Permit were timely filed on May 1, 2012 by David D. and Ieva S. Johnson, on May 10, 2012 by Eva Gayle Sanders, and by Joseph K. and Michelle Yeary. These Petitioners joined in filing an Amended Petition, with attachments.
11. On August 17, 2012, Dale W. Arnett, Esq., entered his appearance as legal counsel for all Petitioners.
12. The Court heard Petitioners' petitions for administrative review and requests for stay of the Permit at a consolidated final hearing on September 13, 2012.
13. In sum⁵, Petitioners object to the Permit and request its Stay for the following reasons:
 - a. Proper notice of the application via newspaper publication was not provided to Petitioners, as required in 327 IAC 5-3, *et seq.*
 - b. The variance IDEM gave for allowing the sewer line to come within 10 feet of wells, instead of 50 feet, should not have been granted as the closer proximity presents a health hazard.
 - c. IDEM considered false information in the form of incorrect allegations stated in some documents that the on-site septic systems were failing.
14. Whitestown did not publish notices of its Application in local newspapers *The Zionsville Sentinel*, or *The Lebanon Reporter*, although the Friday, May 27, 2011 edition of *The Lebanon Reporter* includes notice of Whitestown's intent to apply for financial assistance from USDA – Rural Development for the system. *Amended Petition, Attachment 12.* Copies of articles referencing notices from Whitestown or other municipalities, but not referencing this Application, were excluded from evidence in this cause. *Exs. 16, 17.*
15. Grinder pumps, HDPE piping, and directional drilling are widely used in similar sewer projects, and are typically approved by IDEM as technical alternative standards. *Testimony of Certified Professional Engineer Alex White; Testimony of IDEM permit engineer Levy Soliven.* HDPE pipe is more reliable than some other commonly-approved material. *Id.* Grinder pumps and directional drilling allow projects to be constructed with less disruption to the homes being served, than do materials and methods not subject to variance. *Id.*
16. None of the approved piping was closer than 10 feet from any water supply well.
17. There was no evidence presented that these septic systems had failed. A 2006 Preliminary Engineering Report pertinent to the area stated,

⁴ None of the petitioners were represented by legal counsel when these documents were filed.

⁵ As stated by Petitioners' legal counsel in his opening statement at hearing and in Petitioners' October 22, 2012 Proposed Findings, Conclusions of Law and Order.

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“Wastewater disposed is currently handled by on-site systems. Most of these consist of a septic tank . . . leach field or dry well. [A]nd due to failures, poor drainage and soil limitations, untreated septic effluent could be discharged into surrounding drainageways during wet weather.”

Ex. 4; see also Ex. 5; Tr. p. 42, 45 – 46, 52. Respondents’ witnesses testified that references to septic failure may have been based on the age and type of systems currently in use. Petitioners contended that they wanted to continue to be served by their septic systems, and not by the approved sewer system. Petitioners asserted that the permitted project was not needed if the current septic systems were not failing. And, if the system was not needed, IDEM’s approval should be revoked.

18. Based upon its interpretation of applicable regulations, IDEM did not consider whether existing septic systems were failing when determining whether to issue the permit. IDEM considered septic failure as irrelevant. *Testimony of IDEM permit engineer Levy Soliven, p. 113 – 116.*
19. Petitioners presented no other legal, factual or technical grounds to consider when reviewing whether IDEM properly issued Whitestown’s Permit.

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management (“IDEM”) is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per I.C. § 13-13, *et seq.* The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq.*, and per I.C. § 4-21.5.3.7(a)(1)(A).
2. This is a Final Order pursuant to I.C. § 4-21.5-3-23, I.C. § 4-21.5-3-27 and 315 IAC 1-2-1(9). Findings of Fact that may be construed as conclusions of law that may be construed as findings of fact are so deemed.
3. The OEA’s findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge (“ELJ”) and deference to the agency’s initial factual determination is not allowed. I.C. § 4-21.5-3-27(d); *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E. 100 (Ind. 1993); *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771, 781 (Ind. App. 2005). “*De novo* review” means that “all issues are to be determined anew, based solely upon the evidence adduced at the hearing and independent of any previous findings.” *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind. Ct. App. 1981).

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4. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004)(appeal of OEA review of NPDES permit); *see also* I.C. 4-21.5-3-27(d). "Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *Gas America* 347, 2004 OEA 123, 129. *See also Blue River Valley*, 2005 OEA 1, 11-12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF #9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc.*, 2005 OEA 26,41.
5. As IDEM accurately notes in its October 22, 2012 Proposed Findings of Fact, Conclusions of Law and Order, in order to succeed, Petitioners are required to show that the Permit did not meet applicable regulations for construction of sanitary sewers; many relevant regulations are stated in 327 IAC 3. OEA reviews IDEM's decisions to determine whether IDEM's decision conformed with controlling statutes and regulations. *In re: Objection to Issuance of Section 401 Water Quality Certification COE ID No. 198800247 Conagra Soybean Processing Co.*, 1998 WL 918585 at *3, OEA Cause No. 98-W-J-2052 (Nov. 12, 1988). Allegations that fail to raise any issue concerning compliance with controlling legal requirements fail to state a valid claim. *In re: Objection to Issuance of Public Water Supply Construction Permit No. WS-2924 Issued to the City of Mishawaka, Indiana*, 1989 WL 436899 at *6, OEA Cause No. 89-W-J-241 (September 1, 1989). IDEM is prohibited from expanding its requirements for Whitestown's Permit beyond those specified in 327 IAC 3.
6. IDEM's issuance of Construction Permit Approval No. 20218 to Town of Whitestown for a sanitary sewer system is not affected by the notice Petitioners received of Whitestown's Application. In their October 22, 2012 Proposed Findings of Fact, Conclusions of Law and Order, Petitioners base their claim that Whitestown's Application required public notice on provisions of 327 IAC 5-3. 327 IAC 5-3 is applicable to applications for permits subject to the National Pollution Discharge Elimination System ("NPDES"). NPDES permits typically address non-point source discharges, those that do not come from a particular, controllable point, but discharges which come from a generalized, "non-point" source, such as construction site runoff. Whitestown did not seek approval for a project to which 327 IAC 5 pertained. Instead, Whitestown applied for sanitary sewer construction activities subject to regulations stated in 327 IAC 3.

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327 IAC 3 does not require applicants to provide public notice of applications. Instead, IDEM was required to give notice of the approved Permit to specified entities and individuals, including Petitioners. Substantial evidence establishes that all Petitioners received required notice. Whitestown's Permit does not fail for lack of proper notice.

7. By substantial evidence, Whitestown's Permit conforms with technical system standards stated in 327 IAC 3. IDEM properly did not expand its jurisdiction beyond current regulations by conducting an evaluation as to whether existing septic systems were failing. Nor is IDEM authorized to base a determination as to whether those served by an existing septic system desire to remain on septic service. Nor may IDEM evaluate its sanitary sewer permitting decisions based on allegations of lack of need inferred from an existing septic system's integrity. The Permit and variances IDEM granted for Whitestown's use of grinder pumps, HDPE piping and directional piping satisfied requirements stated in 327 IAC 3.
8. IDEM's determination that Whitestown's HDPE piping may be placed no closer than 10 feet to existing water wells complies with 410 IAC 6-8.2-56, and need not be stated in the Permit.
9. Petitioners did not present substantial evidence that IDEM improperly issued Construction Permit Approval No. 20218 to Town of Whitestown for a sanitary sewer system. Petitioners' Petitions for Administrative Review and Requests for Stay should therefore be denied.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Petitions for Administrative Review and Requests for Stay of Construction Permit Approval No. 20218 issued to Town of Whitestown for a sanitary sewer system, filed by Petitioners David D. and Ieva S. Johnson, Eva G. Sanders, and Joseph K. and Michelle Yearly are **DENIED**. The Indiana Department of Environmental Management's Construction Permit Approval No. 20218 issued to Town of Whitestown is **SUSTAINED**.

You are hereby further notified that pursuant to provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5, *et seq.* Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

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IT IS SO ORDERED in Indianapolis, Indiana this 18TH day of January, 2013.

Hon. Mary L. Davidsen
Chief Environmental Law Judge